ion." [15] But whatever view is taken as to the elements necessary in change of ownership, with the oil ships there was admittedly no change of ownership whatever. They are the property of a German company in which the controlling interest is American, and even if in name the American corporation should take them over it would be difficult to satisfy a prize court that the belligerent interest had been permanently divested. It was palpably a change of registry solely for the purpose of gaining immunity and without a *bonâ fide* cutting off of the German interest, and in either aspect the transfer is void. It is submitted that the same should be true even where the ownership has throughout been completely American. If our capital entrusts itself to the protection of a foreign flag in times of peace for the purpose of obtaining compensatory advantages, it must endure the risks which are incident to such protection when war breaks out.[16] In regard to the belligerent ships which are now interned in some of our harbors, it must be borne in mind that nearly all of them have been subsidized by their respective foreign governments and are subject to conversion into auxiliary warships. They would therefore fall within the total disability of a foreign war vessel, the sale of which is always and under all circumstances void.[17] And even for a strictly private ship the sale of which is absolute and *bonâ fide* as between the parties, it would be difficult to establish that the sale was not directly induced by a desire to put it out of the reach of the warring nation for which it was fair prize; and this, it is submitted, would violate the Declaration of London, and thus tend to jeopardize American neutrality.

THE EVOLUTION OF THE CONTINGENT REMAINDER. — The Committee on Legislation of the Massachusetts Bar Association has proposed an act which, if successful in earning legislative approval, will serve to exterminate whatever vestige of technicality inherent in contingent remainders is now surviving in that jurisdiction.[1]

This eminently desirable result will have been centuries in attainment.[2] Originally, we are told, the creation of any unvested estate

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[15] 2 WESTLAKE, INT. LAW, 2 ed., 255, 256.

[16] *Cf.* this issue of the REVIEW, p. 217. See also 2 WESTLAKE, INT. LAW, 2 ed., 169.

[17] The English practice makes this exception. See PARLIAMENTARY PAPERS MISC No. 5 (1909), 40. "*Si le navire est sous le contrôle d'un ennemi.*"

[1] The full text is to be found in the Report of the Committee on Legislation for 1914, p. 54. It is in part as follows: "A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner as it would have taken effect if it had been an executory devise, or a springing or shifting use, and shall, like such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." The act is accompanied by an admirable "Explanatory Note," which is altogether persuasive and concise.

[2] On the general subject of contingent remainders, springing and shifting uses, and executory devises, see FEARNE, CONTINGENT REMAINDERS, especially vol. 1, 317–415, 490–569; LEAKE, LAW OF PROPERTY IN LAND, 2 ed., 32–43, 233–246, 252–268; WILLIAMS, SEISIN OF THE FREEHOLD, 169–202; WILLIAMS, LAW OF REAL PROPERTY, 22 Eng. ed., 306–411, 17 Int. ed., 410–463; JARMAN ON WILLS, 6 Eng. ed., 1352–1460.

was illegal, but later certain unvested future property interests known as contingent remainders were recognized. They could not be conveyed, although they might be released or devised. Most important of all, a contingent remainder was liable to be lost through failure to vest before the determination, however occasioned, of the prior vested freehold estate.[3] The operation of this rule involved hardship, and defeated the intent of the creator of the interest.[4] With equitable estates, however, this result was not reached, as the outstanding legal title in a mortgagee,[5] or trustee,[6] satisfied the requirement of continuous seisin, the absence of which was the technical reason for not protecting contingent remainders at law. Moreover, after the Statute of Uses,[7] springing and shifting uses became possible, and after the Statute of Wills,[8] executory devises, both of which were independent of the rules respecting seisin, and were therefore indestructible regardless of what happened to the prior estate. There nevertheless prevailed a fixed rule to construe what might have been a use or devise as a contingent remainder wherever under the former law a contingent remainder would have been possible after the prior estate.[9] Consequently, this potentiality for thwarting the intention of grantors and devisors continued as before.

Naturally, effort was made to eliminate the severe effects of the operation of these common-law principles. This has been accomplished in some instances by the court through strained construction of contingent, into vested, remainders,[10] or by repudiating the entire doctrine;[11] but legislative action was necessary for effective reform. First of all, an act of Parliament enabled children *en ventre sa mère* to be considered as born for the purpose of taking an estate;[12] and this is generally law in this country.[13] In 1836 Massachusetts ended the destruction of contingent remainders by the premature ending of the prior vested freehold estate.[14] Nine years later England followed with a similar statute,[15] which also provided for the alienation of contingent property interests by deed.[16] The chance of destruction through failure to vest before

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[3] This determination might be premature, through forfeiture or surrender; or natural, by the prior estate running out.

[4] Examples of the intent of testators being defeated by natural termination are Festing *v.* Allen, 12 M. & W. 279, and White *v.* Summers, [1908] 2 Ch. 256.

[5] Astley *v.* Micklethwait, 15 Ch. Div. 59.

[6] Abbiss *v.* Burney, 17 Ch. Div. 211.

[7] STAT. 27 HEN. VIII., c. 10 (1535).

[8] STAT. 32 HEN. VIII., c. 1 (1540).

[9] Doe d. Planner *v.* Scudamore, 2 B. & P. 289, 298; Crump *v.* Norwood, 7 Taunt. 362.

[10] See Boatman *v.* Boatman, 198 Ill. 414, 65 N. E. 81, criticized in 16 HARV. L. REV. 307.

[11] Kennard *v.* Kennard, 63 N. H. 303; Hayward *v.* Spaulding, 75 N. H. 92, 71 Atl. 219, criticized in 22 HARV. L. REV. 388.

[12] STAT. 10 & 11 WM. III., c. 16 (1699), which had been preceded by Reeve *v.* Long, 3 Lev. 408.

[13] See STIMSON, AMERICAN STATUTE LAW, § 1413.

[14] MASS. R. L., c. 134, § 8.

[15] REAL PROPERTY ACT, STAT. 8 & 9 VICT., c. 106 (1845). This act abolished tortious feoffment. Fines and recoveries had already been abolished by STAT. 3 & 4 WM. IV., c. 74 (1833).

[16] Winslow *v.* Goodwin, 7 Met. 363, 377, shows such to have been the law in Massachusetts.

the natural termination of the preceding freehold, however, persisted until in 1877 Parliament provided against this result "in the event of the particular estate determining before the contingent remainder vests." [17] While contingent remainders expressed to individuals are undoubtedly adequately covered, the act has been criticized as not thoroughly embracing those expressed to classes.[18] The wording of the proposed Massachusetts law avoids this difficulty. Thus, where property is devised to A. for life, remainder to such of his children who attain twenty-one, and A. dies leaving six children, only two of whom are of age, under the English act the two will take to the exclusion of the others;[19] but under the suggested Massachusetts enactment all may eventually take as the testator intended.

The proposed statute further establishes that contingent remainders shall be subject to no other rule concerning remoteness save the rule against perpetuities. This renders impossible in Massachusetts the confusion and indefiniteness ensuing from adopting a further rule forbidding a limitation to an unborn person for life with remainder to the issue of that person.[20] While this provision may be merely declaratory of existing legal principles in that state,[21] it nevertheless is desirable that the law on this point be properly and definitively settled, at the same time avoiding both uncertainty while awaiting judicial decision, and the attendant, and not altogether negligible, risk that the technical English rule might be accepted.

The bill which is to be submitted to the Massachusetts legislature is accordingly worthy of unreserved support. When rules, which are at best but arbitrary and technical historical survivals, not only serve no useful purpose, but by their very existence jeopardize the successful disposition of property, the time for their abolition has come. Their existence until this late day is attributable solely to inertia.[22]

APPLICATION OF THE RULE IN CLAYTON'S CASE TO THE DISTRIBUTION OF PROPERTY HELD UNDER CONSTRUCTIVE AND RESULTING TRUSTS. — It is refreshing to find a recent English case which declines to apply

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[17] LAW ON CONTINGENT REMAINDERS, STAT. 40 & 41 VICT., c. 33.

[18] WILLIAMS, SEISIN OF THE FREEHOLD, 205.

[19] For operation of the rule prior to the statute see Breckenbury *v.* Gibbons, L. R. 2 Ch. Div. 417; Symes *v.* Symes, [1896] 1 Ch. 272.

[20] Whitby *v.* Mitchell, 42 Ch. Div. 494, 44 Ch. Div. 85; extended to equitable estates in *In re* Nash, [1901] 1 Ch. 1; and unsoundly followed in *In re* Park's Settlement, [1914] 1 Ch. 595, which was criticized in 27 HARV. L. REV. 752 and 30 L. QUART. REV. 134, 353. See WILLIAMS, LAW OF REAL PROPERTY, 22 Eng. ed., 420, 17 Int. ed., 470.

[21] There has been no Massachusetts adjudication. But see GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 284 *et seq.*; also 16 HARV. L. REV. 294.

[22] For American statutory changes up to 1886 see STIMSON, AMERICAN STATUTE LAW, § 1426. See ALA. CODE (1907), § 3398; ARIZ. CIVIL CODE (1913), § 4692; GA. CODE (1911), § 3675; KY. STATUTES (1909), § 2346; HOWELL'S MICH. STATUTES (1913), §§ 10654–6; MINN. GENERAL STATUTES (1913), § 6684; N. Y. CONSOLIDATED LAWS (1909), ch. 52, § 58; N. DAK. REVISED CODE (1905), § 4778; S. DAK. COMPILED LAWS (1913), § 258; VA. ANNOTATED CODE (1904), § 2424; W. VA. CODE (1906), § 3031; WIS. STATUTES (1911), § 2058.